Governmental Operations Committee

Wednesday, March 8, 2006

1:00 - 3:00 PM

Morris Hall

Revised

Allan Bense
Speaker

David Rivera
Chairman

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Governmental Operations Committee

Start Date and Time:	Wednesday, March 08, 2006 01:00 pm
End Date and Time:	Wednesday, March 08, 2006 03:00 pm
Location:	Morris Hall (17 HOB)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 237 Continued Employment Requirements for Law Enforcement Personnel by Berfield
HB 325 CS Commission on Capital Cases by Gelber
HB 439 CS Certificate of Birth Resulting in Stillbirth by Planas
HB 567 CS Notaries Public by Kyle
HB 581 Public Benefits by Cretul

Consideration of the following proposed committee bill(s):

PCB GO 06-15 -- OGSR Autopsy Photographs and Audio and Video Recordings

NOTICE FINALIZED on 03/06/2006 16:14 by TUCK.SHIRLEY

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 237 Continued Employment Requirements for Law Enforcement Personnel
SPONSOR(S): Berfield and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 410

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee		Mitchell	Williamson
2) Insurance Committee			
3) Fiscal Council			
4) State Administration Council			
5)			

SUMMARY ANALYSIS

HB 237 allows employing agencies to require law enforcement officers, as well as correctional officers and correctional probation officers who are not currently subject to this requirement, to pass a physical examination prior to or immediately upon employment in order to be eligible for the statutory presumption that total or partial disability or death, which is caused by tuberculosis, heart disease, or hypertension, is accidental and suffered in the line of duty.

HB 237 also provides specific authority for employing agencies to set tobacco-use standards for law enforcement officers, correctional officers, and correctional probation officers.

This bill does not appear to create, modify, or eliminate rulemaking authority.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – This bill changes the entitlement that law enforcement officers, correctional officers, and correctional probation officers have to the statutory presumption that total or partial disability or death, which is caused by tuberculosis, heart disease, or hypertension, is accidental and suffered in the line of duty.

B. EFFECT OF PROPOSED CHANGES:

Disability Presumptions

Section 112.18, Florida Statutes, provides that "any condition or impairment of health" caused by tuberculosis, heart disease, or hypertension that results in total or partial disability or death is presumed to be accidental and to have been suffered in the line of duty for firefighters,[1] law enforcement officers,[2] correctional officers,[3] or correctional probation officers.[4] This presumption may be rebutted by "competent evidence."[5]

Correctional officers and correctional probation officers are entitled to this presumption without a physical examination.[6] Firefighters and law enforcement officers, however, must successfully pass a physical examination "upon entering into such service" as a firefighter or law enforcement officer.[7]

The timing of the "upon entering into such service" examination requirement generally is interpreted in one of two ways: (1) the *first* point in time when a person first begins to work as a firefighter or law enforcement officer; or (2) the point in time when a person begins to work for a particular agency or employer as a firefighter or law enforcement officer.[8]

The potential conflict between the two interpretations becomes particularly evident in light of section 943.13(6), Florida Statutes, which requires officers to pass a physical examination by a licensed physician, physician assistant, or certified advanced registered nurse practitioner. Although this section is silent as to the timing of the examination, the Criminal Justice Standards and Training Commission is authorized to establish the "specifications" for the examination, which it has done through rule 11B-27.002(1)(d), *Florida Administrative Code*, requiring the completion of a physician's assessment with each new employment or appointment of an officer. This rule also prohibits an employing agency from using a physician's assessment that was prepared for another employing agency.

HB 237 resolves the potential conflict in the timing of the examination for purposes of the presumption in section 112.18, Florida Statutes, through the creation of a new subsection (5) to section 943.135,

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[1] The firefighter must be a Florida state, municipal, county, port authority, special tax district, or fire control district firefighter.
[2] Fla. Stat. § 943.10(1) (2005).
[3] Fla. Stat. § 943.10(2) (2005).
[4] Fla. Stat. § 943.10(3) (2005).
[5] Fla. Stat. § 112.18(1) (2005).
[6] *State v. Reese*, 911 So.2d 1291 (1st DCA 2005) (holding that the plain language of the statutes does not require completion of a pre-employment physical as a condition precedent to the entitlement to the statutory presumption as is the case with firefighters and law enforcement officers).
[7] Fla. Stat. § 112.18(1) (2005).
[8] There appears to be only one case which has interpreted this examination requirement, *Cumbie v. City of Milton*, 496 So.2d 923 (1st DCA 1986). In *Cumbie*, a firefighter who did not undergo a physical examination "upon entering his employment" was not entitled to the statutory presumption in section 112.18, Florida Statutes. Yet, interpreting the phrase "upon entering into such service" as "upon entering his employment" does not resolve the two conflicting timing interpretations since both points of time were the same in *Cumbie*.

Florida Statutes. Section 943.135, Florida Statutes, sets forth requirements for continued employment for officers.[9]

The new subsection (5) permits an employing agency[10] to require law enforcement officers, correctional officers, or correctional probation officers[11], who are employed full time, to successfully pass a physical examination in order to be eligible for the presumption in section 112.18, Florida Statutes.[12] As officers are already required to have a physical examination for employment or appointment, HB 237 allows an employing agency to make this physical examination applicable to the presumption in section 112.18, Florida Statutes. This change is particularly significant for correctional officers and correctional probation officers, who are not currently required to have physical examinations in order to receive the presumption in section 112.18, Florida Statutes.

HB 237 provides that the changes to the operation of the presumption in section 112.18, Florida Statutes, do not apply to law enforcement officers, correctional officers, or correctional probation officers who are currently employed by an employing agency.[13]

Tobacco Use Standards

Section 943.137, Florida Statutes, allows employing agencies to establish qualifications and standards for employment, appointment, training, or promotion of officers that exceed certain minimum requirements. According to the Florida Department of Law Enforcement, employing agencies can establish tobacco-use policies under the authority of this section.[14] The authority to set tobacco-use policies is not, however, specifically provided.

HB 237 creates a new subsection (6) within section 943.135, Florida Statutes[15], to specifically authorize an employing agency to set tobacco-use standards for full time law enforcement officers, correctional officers, and correctional probation officers.

C. SECTION DIRECTORY:

Section 1: Adds subsections (5) and (6) to section 943.135, Florida Statutes, to allow employing agencies of law enforcement officers, correctional officers, or correctional probation officers to require certain physical examinations and to set tobacco-use standards.

Section 2: Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate a state revenue source.

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[9] Fla. Stat. § 943.10(14) (2005) ("any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer").
[10] Fla. Stat. § 943.10(4) (2005).
[11] Fla. Stat. § 943.10(1), (2), & (3) (2005).
[12] The new subsection (5) further requires that this physical examination be performed prior to or immediately upon the employment of the officer.
[13] Amendments to statutes which affect the application of the Workers' Compensation Act in chapter 440, Florida Statutes, are either "procedural" or "substantive." Procedural amendments apply retroactively since there is no vested right in any given procedure. *Litvin v. St. Lucie County Sheriff's Dep't*, 599 So.2d 1353 (Fla. 1st DCA), rev. denied, 613 So.2d 6 (Fla.1992), cert. denied, 508 U.S. 913, 113 S.Ct. 2350, 124 L.Ed.2d 258 (1993). To the extent that this change can be characterized as a "burden of proof enactment," it would be a procedural change and apply retroactively unless otherwise limited. Yet, to the extent this change affects duties and rights or impacts benefits that may be received or the entitlement to services, it may be substantive and only apply prospectively anyway.
[14] Fla. Dep't of Law Enforcement., HB 237 (2006) Staff Analysis (Oct. 27, 2005) (on file with dep't).
[15] This section provides the requirements for continued employment for officers.

2. Expenditures:

   This bill does not appear to create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate a revenue source for local governments.

2. Expenditures:

   This bill does not appear to create, modify, amend, or eliminate an expenditure for local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not appear to reduce the percentage of a state tax shared with counties or municipalities. This bill does not appear to reduce the authority that municipalities have to raise revenue.

2. Other:

   There do not appear to be any other constitutional issues.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue: Changing Section 112.18, Florida Statutes, Instead

The potential effect of subsection (5) is to change the operation of the presumption provided in section 112.18, Florida Statutes. As such, the sponsor may wish to consider making these changes directly in section 112.18, Florida Statutes.

Drafting Issue: Placement in Section 943.135, Florida Statutes

Assuming a preference for making these changes in chapter 943, Florida Statutes, instead of section 112.18, Florida Statutes, it is important to note that these two new subsections are not per se "requirements for continued employment" or similar to the existing provisions in section 943.135, Florida Statutes. As such, the sponsor may wish to consider making these two changes in section 943.13(6), Florida Statutes, and section 943.137, Florida Statutes, respectively.

Drafting Issue: Scope of Prospective Operation

A provision in subsection (5) provides that the change in the operation of the presumption provided in section 112.18, Florida Statutes, does not apply for law enforcement officers, correctional officers, or correctional probation officers who are currently employed by an employing agency. This provision could be read to apply beyond the current employment of those officers, correctional officers, or correctional probation officers. If that is not the intent of the sponsor, the sponsor may wish to add a limitation to the provision: "for the period of employment with the current employing agency."

Drafting Issue: "Full Time"

The reference to "full time" in subsection (5) is duplicative as law enforcement officers, correctional officers, and correctional probation officers are full time by definition in section 943.10, Florida Statutes. The sponsor may wish to consider removing this reference.

Drafting Issue: Mirror Examination Language in Section 112.18, Florida Statutes

Given the potential effect of subsection (5) to change the operation of the presumption provided in section 112.18, Florida Statutes, the sponsor may wish to more closely mirror the examination language in that section.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

A bill to be entitled

An act relating to continued employment requirements for law enforcement personnel; amending s. 943.135, F.S.; revising the presumption of disability for certain law enforcement, correctional, and correctional probation officers for purposes of workers' compensation and authorizing establishment of tobacco-use standards; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (5) and (6) are added to section 943.135, Florida Statutes, to read:

943.135 Requirements for continued employment.--

(5) An employing agency as defined in s. 943.10 may require a law enforcement officer, correctional officer, or correctional probation officer as defined in s. 943.10 who are employed full time to successfully pass a physical examination in order to be eligible for the presumption set forth in s. 112.18. The employing agency shall have the physical examination performed prior to or immediately upon employment of the officer. This provision shall not affect the applicability of the presumption set forth in s. 112.18 for law enforcement officers, correctional officers, or correctional probation officers who are currently employed by an employing agency.

(6) An employing agency as defined in s. 943.10 may set tobacco-use standards for law enforcement officers, correctional officers, and correctional probation officers as defined in s.

943.10 who are employed full time.

Section 2. This act shall take effect October 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES
Amendment No. 1

Bill No. **237**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Governmental Operations
Representative(s) Berfield offered the following:

Amendment (with title amendments)

Remove everything after the enacting clause and insert:

Section 1. Subsection (6) of section 943.13, Florida Statutes, is amended to read:

943.13 Officers' minimum qualifications for employment or appointment.—On or after October 1, 1984, any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer or correctional officer; on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional probation officer; and on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional officer by a private entity under contract to the Department of Corrections, to a county commission, or to the Department of Management Services shall:

(6)(a) Have passed a physical examination by a licensed physician, physician assistant, or certified advanced registered nurse practitioner, based on specifications established by the commission.

(b) In order to be eligible for the presumption set forth in s. 112.18 while employed with an employing agency, a law enforcement officer, correctional officer, or correctional probation officer shall have successfully passed the physical examination required by paragraph (a) upon entering into service as a law enforcement officer, correctional officer, or correctional probation officer with the employing agency, which examination failed to reveal any evidence of tuberculosis, heart disease, or hypertension. In no event may a law enforcement officer, correctional officer, or correctional probation officer use a physical examination from a former employing agency for purposes of claiming the presumption set forth in s. 112.18 against the current employing agency.

Section 2. Subsection (1) of section 943.137, Florida Statutes, is amended to read:

943.137 Establishment of qualifications and standards above the minimum.—

(1) Nothing herein may be construed to preclude an employing agency from establishing qualifications and standards for employment, appointment, training, or promotion of officers that exceed the minimum requirements set by ss. 943.13 and 943.17, including establishing tobacco-use standards.

Section 3. This act shall take effect October 1, 2006.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to employment requirements for law enforcement personnel; amending s. 943.13, F.S.; revising the presumption of disability for certain law enforcement, correctional, and correctional probation officers; amending s. 943.137; authorizing the establishment of tobacco-use standards; providing an effective date.

HB 325 CS

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 325 CS Commission on Capital Cases
SPONSOR(S): Gelber
TIED BILLS: **IDEN./SIM. BILLS:** SB 360

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N, w/CS	Kramer	Kramer
2) Governmental Operations Committee		Mitchell	Williamson
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Commission on Capital Cases, a legislative commission within the Office of Legislative Services, maintains a registry of attorneys qualified to represent defendants in capital collateral (postconviction) proceedings. Currently, a registry attorney is authorized to represent only five capital collateral defendants at one time. This bill authorizes a registry attorney to represent up to seven capital collateral defendants at one time.

The bill significantly modifies the minimum qualifications for registry attorneys. The bill requires registry attorneys to submit reports to the commission on a quarterly basis. The bill authorizes the commission to remove an attorney from the registry who has not executed a contract for postconviction representation or filed a quarterly report as required by law.

Currently, a registry attorney is entitled to payment at each stage of the postconviction process according to a statutory schedule. The bill modifies the payment schedule by authorizing payment of an attorney after the final evidentiary hearing has been held on the defendant's postconviction motion rather than requiring the attorney to wait until the judge has ruled on the postconviction motion.

The bill addresses issues with regard to the payment of fees by setting forth the Legislative finding that not all capital collateral cases are extraordinary or unusual, and requiring written findings of fact where a judge deviates upward from the statutorily authorized fee schedule.

This bill does not appear to create, modify, or eliminate rulemaking authority.

The bill does not appear to create, modify, amend, or eliminate revenues of state government or of local governments. The expenditure impact on state government is indeterminate, but expected to be minimal. The bill does not appear to create, modify, amend, or eliminate expenditures of local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill authorizes an attorney to represent 7 capital postconviction defendants, rather than 5 as under current law.

B. EFFECT OF PROPOSED CHANGES:

Commission on Capital Cases

Section 27.709, F.S. creates the Commission on Capital Cases, a legislative commission within the Office of Legislative Services which is tasked with reviewing the "administration of justice in capital collateral cases". The commission is comprised of two members appointed by the Governor,[1] two Senators appointed by the President of the Senate[2] and two members of the House of Representatives appointed by the Speaker of the House of Representatives.[3]

Overview of Postconviction Proceedings in Capital Cases: A defendant who is convicted of a crime in which the death penalty is imposed receives a direct appeal of his or her sentence and conviction to the Florida Supreme Court. At this stage, a capital defendant is represented by the public defender's office, if the defendant is indigent, or by a private attorney. Matters which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. If the Florida Supreme Court affirms the capital defendant's conviction and sentence, a defendant can appeal that decision to the United States Supreme Court by filing a petition for writ of certiorari. If the Supreme Court refuses to hear or rejects the defendant's appeal, a defendant is entitled to begin state postconviction proceedings.

State postconviction proceedings are controlled by rules 3.850, 3.851 and 3.852 of the Florida Rules of Criminal Procedure. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Postconviction proceedings usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence or claims that the prosecution failed to disclose exculpatory evidence. Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

After completion of state postconviction proceedings, a capital defendant is entitled to file a petition for writ of habeas corpus in federal court. The federal court reviews whether the conviction or sentence violates federal law. Federal habeas is limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings. The most common issue raised is whether the defendant's trial counsel was ineffective.

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[1] Judge Paul M. Hawkes, First District Court of Appeal, and Judge Leslie B. Rothenberg, Fourth District Court of Appeal, are the current appointees of the Governor. *See* Comm'n on Capital Cases, Members, available at http://www.floridacapitalcases.state.fl.us/c-members.cfm (last visited Mar. 1, 2006).

[2] Senators Walter G. "Skip" Campbell, Jr. and Victor D. Crist are the current appointees of the Senate President. *See* Comm'n on Capital Cases, Members, available at http://www.floridacapitalcases.state.fl.us/c-members.cfm (last visited Mar. 1, 2006).

[3] Representatives Dan Gelber and Juan-Carlos "J.C." Planas are the current appointees of the Speaker of the House. *See* Comm'n on Capital Cases, Members, available at http://www.floridacapitalcases.state.fl.us/c-members.cfm (last visited Mar. 1, 2006).

Finally, once the Governor signs a death warrant, a defendant will typically file a second Rule 3.850 motion and a second federal habeas petition along with motions to stay the execution.

In the middle and southern regions of Florida, the Capital Collateral Regional Counsel provide postconviction representation to indigent capital defendants.[4] In the northern region of the state, representation is provided by private attorneys appointed by the court.

Registry Attorneys

In 1998, the legislature created a registry of private attorneys to represent a death row inmate when a Capital Collateral Regional Counsel has an excessive caseload or has a conflict of interest. Since 2003 postconviction representation of all indigent capital defendants in the northern region of Florida has been provided by registry attorneys. The registry of attorneys is maintained by the Commission on Capital Cases and is comprised of lawyers who have met certain statutory criteria.[5] A registry attorney must be a member in good standing in the Florida Bar, with not less than three years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of these proceedings.[6] There are currently 138 registry attorneys who, along with 29 Public Defenders, are handling 412 postconviction collateral proceedings.[7]

A registry attorney is required to attend annually at least seven hours of continuing legal education specifically devoted to the defense of capital cases. A registry attorney is not permitted to represent more than five defendants in capital postconviction litigation at any one time.[8]

A registry attorney who is appointed by the court to represent a capital defendant is required to enter into a contract with the Chief Financial Officer. Section 27.711(4), F.S., provides a fee and payment schedule. Upon approval by the trial court, and after certain stages in litigation are complete, a registry attorney is entitled to payment of $100 per hour by the Chief Financial Officer, up to a maximum of:

- $2,500 upon accepting the appointment and filing the notice of appearance;
- $20,000 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief;[9]
- $20,000 after the trial court issues a final order granting or denying the defendant's motion for postconviction relief;
- $20,000 after timely filing in the Florida Supreme Court the defendant's briefs that address the trial court's final order granting or denying the defendant's motion for postconviction relief and the state petition for writ of habeas corpus;
- $10,000 after the trial court issues an order, pursuant to a remand from the Florida Supreme Court, which directs the trial court to hold further proceedings on the motion for postconviction relief;

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[4] s. 27.701, F.S.
[5] s. 27.710(2), F.S
[6] s. 27.704(2), F.S
[7] *See* Comm'n on Capital Cases, Registry Attorneys, available at http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm (last visited Feb. 24, 2006) and Comm'n on Capital Cases, Inmate Legal Status, available at http://www.floridacapitalcases.state.fl.us/c-inmate-status.cfm (last visited Feb. 24, 2006).
[8] There are, however, approximately seven registry attorneys who have caseloads above even seven cases, four more than eleven cases. *See* Comm'n on Capital Cases, Registry Attorneys, available at http://www.floridacapitalcases.state.fl.us/c-registry-attorney.cfm (last visited Feb. 24, 2006). http://www.floridacapitalcases.state.fl.us/c-members.cfm
[9] This paragraph also entitles an attorney to fees if the court schedules a hearing on a matter that makes the filing of the original motion for postconviction relief unnecessary or if the court otherwise disposes of the case; s. 27.704(4)(b), F.S.

- $4,000 after the appeal of the trial court's denial of the motion for postconviction relief and the state petition for writ of habeas corpus become final in the Florida Supreme Court;

- $2,500 at the conclusion of the defendant's postconviction capital collateral proceeding in state court and after filing a petition for writ of certiorari in the U.S. Supreme Court;

- $5,000 if at any time a death warrant is issued to compensate for attorneys fees and costs for representing the defendant throughout the proceedings before the state courts.

In addition, the attorney is authorized to hire an investigator at $40 per hour, up to a maximum of $15,000, to assist in the defendant's representation.[10] The attorney also is entitled to a maximum of $15,000 for miscellaneous expenses, such as the cost of preparing transcripts, compensating expert witnesses and copying documents, although the trial court may approve additional expenses if extraordinary circumstances exist.

The court is required to monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation and must receive and evaluate allegations regarding the performance of assigned counsel.[11]

Fees in excess of statutory schedule

Although fees do not normally exceed the statutory schedule,[12] there have been 15 cases since the inception of the registry program where excess attorneys' fees totaling $356,755 were awarded.[13] There have been four cases where excess investigative fees totaling $21,806 were awarded.[14] There have been 20 cases where trial courts authorized additional miscellaneous expenses totaling $327,813.[15] These excess fee cases have occurred with increasing frequency over the last several years.[16]

Fees can exceed the statutory schedule based on court decisions such as the recent case of *Florida Department of Financial Services v. Freeman*[17], the Florida Supreme Court reaffirmed the holding of several prior cases that it is "within the trial judge's discretion to grant fees beyond the statutory maximum to registry counsel in capital collateral cases when 'extraordinary or unusual circumstances exist.'" In *Freeman*, the Department of Financial Services appealed an order from a circuit court granting a registry attorney, who had signed the required contract for services, fees in excess of the statutory maximum. The trial court had granted $27,940.74 in fees for services that were statutorily capped at $2,500. The *Freeman* opinion reviewed the court's prior holdings on the issue of fees in excess of statutory caps. In *Olive v. Maas*,[18] the court held that "fees in excess of the statutory cap are not always awarded to registry counsel in capital collateral cases; however, registry counsel is not foreclosed from requesting excess compensation 'should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of this or her time, energy and talent". The *Olive* court relied on the opinion of *Makemson v. Martin County*,[19] which related to compensation to attorneys representing capital defendants at the trial and during direct appeal.

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[10] s. 27.711(5), F.S.
[11] s. 27.711(12), F.S.
[12] Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).
[13] Comm'n on Capital Cases, Payments in Excess of Statutory Caps Since Inception of the Registry Program (spreadsheet) (last updated Jan 31. 2006) (on file the comm'n).
[14] *Id.*
[15] *Id.*
[16] Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).
[17] Florida Department of Financial Services v. Freeman, 2006 WL 176748 (Fla. January 26, 2006).
[18] *Olive v. Maas*, 811 So.2d 644 (Fla. 2002).
[19] 491 So.2d 1109 (Fla. 1986)

According to the *Freeman* court, the attorney requesting fees in excess of the statutory limits has the burden of establishing facts in support of the award. The Florida Supreme Court found that the record from the trial court provided "no evidence upon which the judge could rely to determine if extraordinary or unusual circumstances existed to support an award of excessive fees" and remanded the case back to the trial court for an evidentiary hearing.

Effect of HB 325

Continuing legal education: HB 325 amends s. 27.709, F.S., to authorize the Commission on Capital Cases to sponsor continuing legal education training devoted specifically to capital cases and to undertake any project recommended or approved by the commission members.

The bill also amends s. 27.710, F.S., to modify the continuing legal education (CLE) requirements for registry attorneys. Currently, the registry attorneys must attend 10 hours of CLE annually. The bill requires registry attorneys who are handling a capital case to attend at least 12 hours of CLE every two years.

Currently, an attorney who is actively representing a capital defendant is entitled to a maximum of $500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants. The bill amends s. 27.711, F.S., to clarify that a registry attorney is entitled to $500 for CLE expenses, regardless of how many capital defendants the attorney represents.

Qualifications: Currently, to be eligible for court appointment as counsel in postconviction proceedings, an attorney must certify that he or she satisfies the minimum experience and training requirements. As explained above, a registry attorney must have not less than three years experience in the practice of criminal law, and must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of these proceedings. These requirements are the same as those for the Capital Collateral Regional Counsel. The bill substantially modifies the minimum requirements for registry counsel in s. 27.710, F.S., by requiring that a registry attorney to certify that he or she:

1. Is an active practitioner who has at least five years' experience in the practice of criminal law;
2. Is familiar with the production of evidence and the use of expert witnesses, including psychiatric and forensic evidence;
3. Has demonstrated proficiency necessary for representation in capital cases including the investigation and presentation of mitigation evidence;
4. Has satisfied the above CLE requirements;
5. Has tried at least nine state or federal criminal jury trials to completion, two of which must have been capital cases and
    a. Three of which must have been murder trials;
    b. One of which must have been a murder trial and five of which must have been other felony trials; or
    c. One of which must have included a postconviction evidentiary hearing and five of which must have been other felony trials
6. Alternatively, the attorney can certify that he or she has appealed one capital conviction and appealed at least:
    a. Three felony convictions, one of which must have been murder;
    b. Three felony convictions and participated in one capital postconviction evidentiary hearing; or
    c. Felony convictions, two of which must have been murders.

If the trial court finds that exceptional circumstances exist requiring appointment of an attorney who does not meet the criteria set forth above, the trial court must enter a written order specifying the exceptional circumstances requiring appointment of the attorney and explicit findings that the attorney chosen will provide competent representation in accordance with the intent of the section.

Failure to comply with criterion set forth in the section may be cause to remove the attorney from the registry until the criterion is satisfied. The bill provides that satisfaction of the minimum requirements must be proven by written notification to the commission. The certification requirement can be satisfied by submission of the application by electronic mail without a signature.

These changes are consistent with rule 3.112 of the Rules of Criminal Procedure, which were promulgated by the Florida Supreme Court to set minimum standards for attorneys in capital cases. These changes also are not expected to adversely impact the number of registry attorneys.[20]

Contracting: Currently, a private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If an attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the commission must notify the trial court. HB 325 requires the executive director to remove the attorney from the registry list.

Quarterly reporting: The bill also requires a registry attorney to agree to submit quarterly reports to the commission and provides that if an attorney fails to submit a quarterly report within 30 days following the end of the quarter, the executive director must remove the attorney from the registry and the court may impose a fine or remove the attorney from the case.

Federal representation: The bill provides that if a registry attorney does not wish to continue representation in the federal courts, the attorney must make reasonable efforts to assist the defendant in finding replacement counsel who meets the federal requirements to represent a capital defendant in federal proceedings.

Payment: The bill also amends s. 27.711, F.S., to modify the payment schedule for registry attorneys. The bill authorizes payment of $100 per hour, up to a maximum of $20,000 after the final hearing on the capital defendant's motion for postconviction relief rather than when the trial court issues a final order granting or denying the defendant's motion. In some cases, judges take an extended amount of time in ruling on a postconviction motion after the evidentiary hearing – this provision will authorize payment to the attorney sooner. The bill authorizes payment of $100 per hour, up to a maximum of $2,500 for the preparation of an initial federal pleading rather than after filing a petition for writ of certiorari in the United States Supreme Court.

The bill provides that an attorney appointed under s. 27.710, F.S., or appointed by the court to replace a capital collateral regional counsel staff attorney or capital collateral regional counsel contract attorney, who incurs costs for representing capital defendants on a pro bono basis shall be paid from registry funds by the Chief Financial Officer if approved by the trial court.

The bill provides that if a trial court judge intends to award attorney fees in excess of those outlined in statute, the judge must include written findings of fact that specifically state the extraordinary nature of the expenditures of the time, energy, and talents of the attorney in the case which are not ordinarily expended in other capital collateral cases. The bill also amends s. 27.7001, F.S., to provide that the Legislature finds that not all capital collateral cases are extraordinary or unusual.

Limitation on number of inmates represented: The bill authorizes a registry attorney to represent up to seven inmates in capital postconviction litigation at any one time rather than only five inmates. The seven-inmate-representation limit includes capital postconviction cases proceeding under contract with the capital collateral regional counsel[21], inmates represented pro bono and inmates privately retaining

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[20] Conversation, Executive Dir., Comm'n on Capital Cases (Feb. 24, 2006).

[21] Section 27.704(2), F.S. authorizes the CCRC to contact with private counsel or with public defenders to provide representation to death sentenced inmates.

the attorney. An attorney may not be appointed to additional capital postconviction cases until the attorney's representation total falls below the seven-case limit.

C. SECTION DIRECTORY:

Section 1. Amends s. 27.7001, F.S., to provide legislative findings.

Section 2. Amends s. 27.709, F.S., to authorize the Commission on Capital Cases to sponsor continuing legal education programs.

Section 3. Amends s. 27.710, F.S., to change the criteria for registry attorneys; to require quarterly reporting to commission; and to authorize executive director to remove attorney from registry in certain circumstances.

Section 4. Amends s. 27.711, F.S., to modify payment schedule for registry attorneys.

Section 5. Provides effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate revenues of state government.

2. Expenditures:

   The impact of the bill on expenditures of state government is indeterminate. While authorizing additional cases per attorney, large changes to the number of death sentence cases are not expected.

   Also, the bill provides that if a judge intends to award attorney fees in excess of those authorized by law, the judge must make findings of fact justifying the order. Courts are already allowing for fees in excess of statutory caps in certain circumstances. To the extent that judges are currently ordering fees in excess of the statutory maximum in cases that would not qualify as extraordinary, this bill may result in a limitation on excessive fees.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to create, modify, amend, or eliminate revenues of local governments.

2. Expenditures:

   This bill does not appear to create, modify, amend, or eliminate expenditures of local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Court-appointed capital collateral counsel should receive certain fees more quickly than under current law, in that the bill provides for payment after the final hearing on the original motion for postconviction relief, rather than upon the issuance of the court's order on the motion. Further, costs incurred by an attorney who has taken a capital collateral case on a pro bono basis may be paid by the Chief Financial Officer, upon approval of the court.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

There do not appear to be any other constitutional issues.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue (Lines 180-200): Effect and Remedy for Removal

It is not clear what effect removing an attorney from the registry (for not entering into the required contract with the Department of Financial Services or not submitting the required quarterly report) will have on the current representation of clients by the registry attorney. Most likely, it will only serve as a barrier to future representation.

There also is the issue of whether an attorney who has been removed from the registry can get back on the registry. If an attorney does not submit a quarterly report within 30 days after the end of the quarter, the bill is clear that the executive director is required to remove that attorney from the registry, even if there was a valid reason (*e.g.* illness) for not submitting the report. Yet, there is no process for a removed attorney to return the registry. The current language could be interpreted as a bar: once removed from the registry, the attorney is permanently off the registry.

The sponsor may wish to amend this language if either of these outcomes are the intended result.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Criminal Justice Committee adopted a strike-all amendment which:

- Changed the statutory limit on the number of inmates that a registry attorney is authorized to represent from ten to seven. [The current statutory limit is five.]
- Modified the minimum qualifications for registry attorneys.
- Authorized a judge to impose a fine or remove an attorney from the registry if the attorney does not submit a required quarterly report.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to the Commission on Capital Cases; amending s. 27.7001, F.S.; providing legislative findings; amending s. 27.709, F.S.; authorizing the Commission on Capital Cases to sponsor continuing legal education programs devoted specifically to capital cases; amending s. 27.710, F.S.; specifying criteria that a private attorney must satisfy in order to be eligible to be appointed as counsel in a postconviction capital collateral proceeding; providing that a judge may appoint an attorney who does not meet the appointment criteria if exceptional circumstances exist; providing that an attorney may be removed from the capital collateral registry if the attorney does not meet the criteria; directing the executive director of the commission to remove an attorney from the registry if the attorney fails to timely file an executed contract; requiring a private attorney appointed by a court to represent a capital defendant to submit a report each quarter to the

commission; requiring that the executive director remove an attorney from the registry if the attorney does not submit the report within a specified time; requiring that an attorney make reasonable efforts to assist the person under a sentence of death in finding an attorney under certain circumstances; amending s. 27.711, F.S.; requiring that costs incurred during pro bono representation of a capital defendant be paid to the attorney; providing that an attorney who is listed on the registry and representing at least one capital defendant is entitled to tuition and expenses for continuing legal education courses; providing that an attorney may represent no more than seven inmates in capital postconviction cases at any one time; requiring that, if a trial court judge intends to award attorney's fees in excess of those set by law, the judge must include written findings of fact specifically stating the extraordinary nature of the expenditures of the time, energy, and talents of the attorney in the case which are not ordinarily expended in other capital collateral cases; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 27.7001, Florida Statutes, is amended to read:

27.7001 Legislative intent and findings.--It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.7001-27.711, inclusive, to provide for the collateral

representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice. It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation. The Legislature further finds that not all capital collateral cases are extraordinary or unusual.

Section 2. Paragraph (d) is added to subsection (2) of section 27.709, Florida Statutes, to read:

27.709 Commission on Capital Cases.--

(2)

(d) The commission may sponsor programs of continuing legal education which are devoted specifically to capital cases and shall undertake any project recommended or approved by the commission members.

Section 3. Section 27.710, Florida Statutes, is amended to read:

27.710 Registry of attorneys applying to represent persons in postconviction capital collateral proceedings; certification of minimum requirements; appointment by trial court.--

(1) The executive director of the Commission on Capital Cases shall compile and maintain a statewide registry of attorneys in private practice who have certified that they meet the ~~minimum~~ requirements of this section and ~~s. 27.704(2),~~ who

are available for appointment by the court under this section to represent persons convicted and sentenced to death in this state in postconviction collateral proceedings~~, and who have attended within the last year a continuing legal education program of at least 10 hours' duration devoted specifically to the defense of capital cases, if available. Continuing legal education programs meeting the requirements of this rule offered by The Florida Bar or another recognized provider and approved for continuing legal education credit by The Florida Bar shall satisfy this requirement. The failure to comply with this requirement may be cause for removal from the list until the requirement is fulfilled~~. To ensure that sufficient attorneys are available for appointment by the court, when the number of attorneys on the registry falls below 50, the executive director shall notify the chief judge of each circuit by letter and request the chief judge to promptly submit the names of at least three private attorneys who regularly practice criminal law in that circuit and who appear to meet the minimum requirements to represent persons in postconviction capital collateral proceedings. The executive director shall send an application to each attorney identified by the chief judge so that the attorney may register for appointment as counsel in postconviction capital collateral proceedings. As necessary, the executive director may also advertise in legal publications and other appropriate media for qualified attorneys interested in registering for appointment as counsel in postconviction capital collateral proceedings. Not later than September 1 of each year, and as necessary thereafter, the executive director shall provide to the Chief

Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of its registry of attorneys who are available for appointment as counsel in postconviction capital collateral proceedings. The registry must be indexed by judicial circuit and must contain the requisite information submitted by the applicants in accordance with this section.

(2)(a) To be eligible for court appointment as counsel in postconviction capital collateral proceedings, an attorney must certify on an application provided by the executive director that he or she is a member in good standing of The Florida Bar and:

1. Is an active practitioner who has at least 5 years' experience in the practice of criminal law, is familiar with the production of evidence and the use of expert witnesses, including psychiatric and forensic evidence, and has demonstrated the proficiency necessary for representation in capital cases, including the investigation and presentation of mitigation evidence;

2. Has attended a minimum of 12 hours of continuing legal education programs within the previous 2 years which were devoted to the defense of capital cases and offered by The Florida Bar or another recognized provider of continuing legal education courses; and

3.a. Has tried at least nine state or federal jury trials to completion, two of which must have been capital cases and:

(I) Three of which must have been murder trials;

(II) One of which must have been a murder trial and five of which must have been other felony trials; or

(III) One of which must have included a postconviction evidentiary hearing and five of which must have been other felony trials; or

b. Has appealed one capital conviction and appealed:

(I) At least three felony convictions, one of which must have been a murder;

(II) At least three felony convictions and participated in one capital postconviction evidentiary hearing; or

(III) At least six felony convictions, two of which must have been murders.

(b) If the trial court finds that exceptional circumstances exist requiring appointment of an attorney who does not meet the criteria set forth in paragraph (a), the trial court shall enter a written order specifying the exceptional circumstances requiring appointment of the attorney and explicit findings that the attorney chosen will provide competent representation in accordance with the intent of this section.

(c) A failure to comply with any criterion set forth in paragraph (a) may be cause to remove the attorney from the registry until the criterion is satisfied.

(d) Satisfaction of the criterion may be proven by submitting a written certification to the commission. The certification is complete upon submission of the application by electronic mail without a signature ~~satisfies the minimum requirements for private counsel set forth in s. 27.704(2)~~.

(3) An attorney ~~who applies for registration and court appointment as counsel in postconviction capital collateral proceedings must certify that he or she is counsel of record in not more than four such proceedings and, if~~ appointed to represent a person in postconviction capital collateral proceedings~~,~~ shall continue the ~~such~~ representation under the terms and conditions set forth in s. 27.711 until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court. The court may not permit an attorney to withdraw from representation without a finding of sufficient good cause. The court may impose appropriate sanctions if it finds that an attorney has shown bad faith with respect to continuing to represent a defendant in a postconviction capital collateral proceeding. This section does not preclude the court from reassigning a case to a capital collateral regional counsel following discontinuation of representation if a conflict of interest no longer exists with respect to the case.

(4)(a) Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If the appointed attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the Commission on Capital Cases shall notify the trial court and shall remove the attorney from the registry list. The Chief Financial Officer shall develop the form of the contract, function as contract manager, and enforce performance of the terms and conditions of the contract. By signing such contract,

the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.

(b) Each private attorney appointed by a court to represent a capital defendant shall submit a report each quarter to the commission in the format designated by the commission. If the attorney does not submit the report within 30 days after the end of the quarter, the executive director shall remove the attorney from the registry and the court may impose a fine or remove the attorney from the case.

(5)(a) Upon the motion of the capital collateral regional counsel to withdraw under ~~pursuant to~~ s. 924.056(1)(a); or

(b) Upon notification by the state attorney or the Attorney General that:

1. Thirty days have elapsed since appointment of the capital collateral regional counsel and no entry of appearance has been filed under ~~pursuant to~~ s. 924.056; or

2. A person under sentence of death who was previously represented by private counsel is currently unrepresented in a postconviction capital collateral proceeding,

the executive director shall immediately notify the trial court that imposed the sentence of death that the court must immediately appoint an attorney, selected from the current registry, to represent the ~~such~~ person in collateral actions challenging the legality of the judgment and sentence in the appropriate state and federal courts. If the attorney appointed

to represent a person under a sentence of death does not wish to continue representing the person in federal proceedings, the attorney must make reasonable efforts to assist the person in finding an attorney who meets the federal criteria to represent the person in any federal proceedings. The court shall have the authority to strike a notice of appearance filed by a Capital Collateral Regional Counsel, if the court finds the notice was not filed in good faith and may so notify the executive director that the client is no longer represented by the Office of Capital Collateral Regional Counsel. In making an assignment, the court shall give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death. The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death.

(6) More than one attorney may not be appointed and compensated at any one time under s. 27.711 to represent a person in postconviction capital collateral proceedings. However, an attorney appointed under this section may designate another attorney to assist him or her if the designated attorney meets the qualifications of this section.

Section 4. Subsections (3), (4), (7), and (9) of section 27.711, Florida Statutes, are amended, and subsection (15) is added to that section, to read:

27.711 Terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings.--

(3) An attorney appointed to represent a capital defendant is entitled to payment of the fees set forth in this section only upon full performance by the attorney of the duties specified in this section and approval of payment by the trial court, and the submission of a payment request by the attorney, subject to the availability of sufficient funding specifically appropriated for this purpose. An attorney may not be compensated under this section for work performed by the attorney before July 1, 2003, while employed by the northern regional office of the capital collateral counsel. The Chief Financial Officer shall notify the executive director and the court if it appears that sufficient funding has not been specifically appropriated for this purpose to pay any fees which may be incurred. The attorney shall maintain appropriate documentation, including a current and detailed hourly accounting of time spent representing the capital defendant. The fee and payment schedule in this section is the exclusive means of compensating a court-appointed attorney who represents a capital defendant. When appropriate, a court-appointed attorney must seek further compensation from the Federal Government, as provided in 18 U.S.C. s. 3006A or other federal law, in habeas corpus litigation in the federal courts. An attorney appointed under s. 27.710, or appointed by the court to replace a capital collateral regional counsel staff attorney or capital collateral regional counsel contract attorney, who incurs costs for representing capital defendants on a pro bono basis shall be

paid from registry funds by the Chief Financial Officer. These payments must be approved by the trial court before payment.

(4) Upon approval by the trial court, an attorney appointed to represent a capital defendant under s. 27.710 is entitled to payment of the following fees by the Chief Financial Officer:

(a) Regardless of the stage of postconviction capital collateral proceedings, the attorney is entitled to $100 per hour, up to a maximum of $2,500, after accepting appointment and filing a notice of appearance.

(b) The attorney is entitled to $100 per hour, up to a maximum of $20,000, after timely filing in the trial court the capital defendant's complete original motion for postconviction relief under the Florida Rules of Criminal Procedure. The motion must raise all issues to be addressed by the trial court. However, an attorney is entitled to fees under this paragraph if the court schedules a hearing on a matter that makes the filing of the original motion for postconviction relief unnecessary or if the court otherwise disposes of the case.

(c) The attorney is entitled to $100 per hour, up to a maximum of $20,000, after the final hearing on ~~trial court issues a final order granting or denying~~ the capital defendant's motion for postconviction relief.

(d) The attorney is entitled to $100 per hour, up to a maximum of $20,000, after timely filing in the Supreme Court the capital defendant's brief or briefs that address the trial court's final order granting or denying the capital defendant's

motion for postconviction relief and the state petition for writ of habeas corpus.

(e) The attorney is entitled to $100 per hour, up to a maximum of $10,000, after the trial court issues an order, following ~~pursuant to~~ a remand from the Supreme Court, which directs the trial court to hold further proceedings on the capital defendant's motion for postconviction relief.

(f) The attorney is entitled to $100 per hour, up to a maximum of $4,000, after the appeal of the trial court's denial of the capital defendant's motion for postconviction relief and the capital defendant's state petition for writ of habeas corpus become final in the Supreme Court.

(g) At the conclusion of the capital defendant's postconviction capital collateral proceedings in state court, the attorney is entitled to $100 per hour, up to a maximum of $2,500, for the preparation of the initial federal pleading ~~after filing a petition for writ of certiorari in the Supreme Court of the United States~~.

(h) If, at any time, a death warrant is issued, the attorney is entitled to $100 per hour, up to a maximum of $5,000. This payment shall be full compensation for attorney's fees and costs for representing the capital defendant throughout the proceedings before the state courts of Florida.

The hours billed by a contracting attorney under this subsection may include time devoted to representation of the defendant by another attorney who is qualified under s. 27.710 and who has

been designated by the contracting attorney to assist him or her.

(7) Each registry ~~An~~ attorney who is representing at least one capital defendant ~~actively representing a capital defendant~~ is entitled to a maximum of $500 per fiscal year for tuition and expenses for continuing legal education that pertains to the representation of capital defendants, regardless of the total number of capital defendants the attorney is representing. Upon approval by the trial court, the attorney is entitled to payment by the Chief Financial Officer for expenses for such tuition and continuing legal education.

(9) An attorney may not represent more than seven inmates ~~five defendants~~ in capital postconviction litigation at any one time. The seven-inmate-representation limit includes capital postconviction cases proceeding under contract with the capital collateral regional counsel, inmates represented pro bono, and inmates privately retaining the attorney. An attorney may not be appointed to additional capital postconviction cases until the attorney's representation total falls below the seven-case limit.

(15) If a trial court judge intends to award attorney fees in excess of those outlined in this section, the judge must include written findings of fact that specifically state the extraordinary nature of the expenditures of the time, energy, and talents of the attorney in the case which are not ordinarily expended in other capital collateral cases.

Section 5. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 439 CS Certificate of Birth Resulting in Stillbirth
SPONSOR(S): Planas and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 746

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Health Care Regulation Committee	9 Y, 0 N, w/CS	Bell	Mitchell
2) Governmental Operations Committee		Ziegler/Mitchell	Williamson
3) Health Care Appropriations Committee			
4) Health & Families Council			
5)			

SUMMARY ANALYSIS

The bill allows the parent of a stillborn child to receive a "certificate of birth resulting in stillbirth." The bill specifies the information to be given the parent of a stillborn child regarding the availability of the certificate of birth resulting in stillbirth. The bill sets forth requirements for the certificate of birth resulting in stillbirth.

The bill authorizes the Department of Health to prescribe the form and content of a certificate of birth resulting in stillbirth by rule. The bill also provides a broad grant of rulemaking authority to the Department of Health for administration.

The fiscal impact on state government expenditures is estimated at $4,700 for forms and computer system modifications in the first year. The fiscal impact on state government revenues is projected to be $603 in the first year and $900 in the second year. The bill does not appear to create, modify, or eliminate revenues or expenditures of local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government - The bill creates a "certificate of birth resulting in stillbirth." The certificate of birth resulting in stillbirth is optional and is in addition to the certificate of fetal death. There appears to be a fiscal impact on state government expenditures which is not immediately offset by a fiscal impact on state government revenues. The bill increases the rulemaking authority of the Department of Health.

Empower Families - The certificate of birth resulting in stillbirth may help families with the grieving and healing process.

B. EFFECT OF PROPOSED CHANGES:

Vital Records and Fetal Deaths

The Florida Vital Statistics Act[1] authorizes the Department of Health to establish an Office of Vital Statistics, which is responsible for the uniform and efficient registration, compilation, storage, and preservation of all vital records[2] in Florida, including births and fetal deaths.[3]

Section 382.031, Florida Statutes, sets forth the requirements for certificates of births for live births.[4] Section 382.008, Florida Statutes, sets forth the requirements for certificates of fetal death.[5]

There currently is no separate definition, category, or certificate for a stillbirth, which is "an unintended, intrauterine fetal death after a gestational age of not less than 20 completed weeks."[6] This bill creates a definition of stillbirth[7] and creates section 382.0085, Florida Statutes, to provide for a "stillbirth registration."

The bill requires the person filing the fetal death certificate[8] to advise the parent of a stillborn child that the parent has the option to obtain a "certificate of birth resulting in stillbirth"[9] by contacting the Office of Vital Statistics. The bill provides that a certificate of birth resulting in stillbirth:

- May only be requested by a parent named on a fetal death certificate;
- May be issued regardless of the date on which the certificate of fetal death was issued;
- May be subject to a fee of not less than $3 or more than $5;

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[1] Fla. Stat. § 382.001 (2005) (provides that chapter 382, Florida Statutes, is the Florida Vital Statistics Act).
[2] Fla. Stat. § 382.002(13) (2005) (vital records include certificates or reports of birth, death, fetal death, marriage, dissolution of marriage (divorce), and name changes).
[3] Fla. Stat. § 382.003 (2005).
[4] Fla. Stat. § 382.002(9) (2005) ("the complete expulsion or extraction of a product of human conception from its mother, irrespective of the duration of pregnancy, which, after such expulsion, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, and definite movement of the voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached").
[5] Fla. Stat. § 382.002(5) (2005) ("death prior to the complete expulsion or extraction of a product of human conception from its mother if the 20th week of gestation has been reached and the death is indicated by the fact that after such expulsion or extraction the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles").
[6] Fla. HB 439 CS (2005).
[7] The bill creates a new definition in section 382.002(14), Florida Statutes.
[8] Fla. Stat. §382.008(2) (2005) (The funeral director is responsible for filing the certificate of fetal death; in the absence of a funeral director, a physician or other person in attendance at or after the death is responsible for filing the certificate of fetal death.)
[9] The bill creates a new definition in section 382.002(1), Florida Statutes.

- Must include the state file number of the corresponding certificate of death;
- Must contain the statement: "This certificate is not proof of a live birth."
- May not be used to calculate live birth statistics;

The bill requires the parents to be told how to contact the Office of Vital Statistics and that the copy of the certificate of birth resulting in stillbirth is a public record.

The bill authorizes rulemaking by the Department of Health to prescribe the form and content of the certificate of birth resulting in death and to specify the information necessary to prepare the certificate. The bill also permits broad rulemaking "to administer" section 382.0085, Florida Statutes.

The bill provides that the Department of Health is entitled to a fee of not less than $3 or more than $5 for the certificate of birth resulting in still birth.

The bill takes effect July 1, 2006.

Stillbirth Legislation in Other States

Thirteen other states have passed legislation which provides a certificate that includes the words "Certificate of Birth" in the title to the parents of stillborn children: Arizona (2001), Indiana (2002), Louisiana (2003), Maryland (2003), Massachusetts (2002), Minnesota (2005), Missouri (2004), New Jersey (2004), South Carolina (2004), Texas (2005), Utah (2002), Virginia (2003), and Wisconsin (2004).[10]

C. SECTION DIRECTORY:

Section 1: Amends section 382.002, Florida Statutes, to provide definitions.

Section 2: Creates section 382.0085, Florida Statutes, to provide for stillbirth registration and a certificate of birth resulting in stillbirth.

Section 3: Amends section 382.0255, Florida Statutes, to provide a fee.

Section 4: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Department of Health estimates a $603 fiscal impact on state government revenues in year one and a $900 fiscal impact on state government revenues in year two.

2. Expenditures:

   The Department of Health estimates a $4,700 fiscal impact on state government revenues: $1,200 for form design/printing costs and $3,500 for computer system modifications.

[10] MISS Foundation, Legislative Reference Site, at http://www.missingangelsbill.org/stchart.html (last visited Mar. 6, 2006) (the MISS Foundation believes that states should record births as births, whether live or still, since

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to create, modify, amend, or eliminate revenues of local governments.

2. Expenditures:

This bill does not appear to create, modify, amend, or eliminate expenditures of local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Office of Vital Statistics is authorized to charge a fee for a certificate of birth resulting in stillbirth.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds. This bill does not appear to reduce the percentage of state tax shared with counties or municipalities. This bill does not appear reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the Department of Health to prescribe the form and content of a certificate of birth resulting in stillbirth by rule. The bill also provides a broad grant of rulemaking authority to the Department of Health for administering the new provision.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue: Ordering a Certificate

The bill currently provides that a parent *may* provide a name for a stillborn child, the date of the event, and the county in which the event occurred on the request for a certificate of birth resulting in stillbirth. This language may be too permissive for the Department of Health to be able to require sufficient information in order to locate the fetal death certificate. That is, a parent is not required to provide *any* information, but can request a certificate of birth resulting in stillbirth. The Department of Health would then be required to do a more expansive records search or ask for additional information which the parents are not required to give. As such, the sponsor may wish to require the date of the event and the county in which the event occurred, but keep the name optional.

Drafting Issue: Public Record

In creating the certificate of birth resulting in stillbirth, the bill does not unequivocally provide whether this certificate acts as a birth certificate or a fetal death certificate. Although the bill provides duplicitous warning requirements for parents that the certificate of birth resulting in stillbirth is a public record,

section 382.025(1), Florida Statutes, provides that "all birth records of this state shall be confidential and exempt from the provisions of section 119.07(1), Florida Statutes."[11]

The sponsor may wish to specifically state how this record should operate. The sponsor may also wish to remove the duplicitous public record warning requirements.

Drafting Issue: Rulemaking Authority

The bill authorizes the Department of Health to "adopt rules...to administer this section." Because this is a very broad grant of rulemaking authority, the sponsor may wish to provide more specific guidance to the Department of Health.

Drafting Issue: Fee Placement

The authorization for the Department of Health to charge a fee for a certificate of birth resulting in stillbirth is placed in a paragraph relating to records searched and retrieved. The sponsor may wish to create a new paragraph to provide for these fees.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006 the Health Care Regulation Committee adopted three amendments:

- Amendment 1 - Specified that a Certificate of Birth Resulting in Stillbirth is a public record.
- Amendment 2 - Removed a time constraint on the Department of Health development of the form and content of the Certificate of Birth Resulting in Stillbirth by rule.
- Amendment 3 - Requires the Office of Vital Statistics to inform any patient that requests a Certificate of Birth Resulting in Stillbirth that the document is an official public record.

The Heath Care Regulation Committee reported the bill favorably with committee substitute.

[11] This provision does not apply to birth records over 100 years old or those under seal pursuant to court order.

CHAMBER ACTION

The Health Care Regulation Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to certificate of birth resulting in stillbirth; amending s. 382.002, F.S.; providing definitions; creating s. 382.0085, F.S.; requiring that the person required to file the fetal death certificate advise a parent of a stillborn child about the availability of a certificate of birth resulting in stillbirth; requiring that the person required to file the fetal death certificate inform a parent of a stillborn child that copies of the birth certificate resulting in stillbirth may be available as a public record; authorizing the parent to name the stillborn child on a certificate; requiring a state file number for the certificate; requiring the Department of Health to prescribe the form and content of the certificate by rule; prohibiting the Office of Vital Statistics within the Department of Health from using a certificate of birth resulting in stillbirth to calculate certain statistics; authorizing a parent to request a certificate of birth

resulting in stillbirth without regard to the date on which the certificate of fetal death was issued; authorizing certain parents to request a certificate of birth resulting in stillbirth from the Office of Vital Statistics; requiring the Office of Vital Statistics to inform such parents that a copy of a certificate of birth resulting in stillbirth may be available as a public record; authorizing the Office of Vital Statistics to charge a fee; requiring a certificate of birth resulting in stillbirth to contain certain information; requiring the department to adopt rules; amending s. 382.0255, F.S.; authorizing the department to collect fees for a search or retrieval of a certificate of birth resulting in stillbirth; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 382.002, Florida Statutes, is amended to read:

382.002 Definitions.--As used in this chapter, the term:

(1) "Certificate of birth resulting in stillbirth" means a certificate issued to record the birth of a stillborn child.

(2)~~(1)~~ "Certification" or "certified" means a document containing all or a part of the exact information contained on the original vital record, and which, when issued by the State Registrar, has the full force and effect of the original vital record.

(3) ~~(2)~~ "Dead body" means a human body or such parts of a human body from the condition of which it reasonably may be concluded that death recently occurred.

(4) ~~(3)~~ "Department" means the Department of Health.

(5) ~~(4)~~ "Dissolution of marriage" includes an annulment of marriage.

(6) ~~(5)~~ "Fetal death" means death prior to the complete expulsion or extraction of a product of human conception from its mother if the 20th week of gestation has been reached and the death is indicated by the fact that after such expulsion or extraction the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

(7) ~~(6)~~ "Final disposition" means the burial, interment, cremation, removal from the state, or other authorized disposition of a dead body or a fetus as described in subsection (6) ~~(5)~~. In the case of cremation, dispersion of ashes or cremation residue is considered to occur after final disposition; the cremation itself is considered final disposition.

(8) ~~(7)~~ "Funeral director" means a licensed funeral director or direct disposer licensed pursuant to chapter 497 or other person who first assumes custody of or effects the final disposition of a dead body or a fetus as described in subsection (6) ~~(5)~~.

(9) ~~(8)~~ "Legal age" means a person who is not a minor, or a minor who has had the disability of nonage removed as provided under chapter 743.

(10) ~~(9)~~ "Live birth" means the complete expulsion or extraction of a product of human conception from its mother, irrespective of the duration of pregnancy, which, after such expulsion, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, and definite movement of the voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

(11) ~~(10)~~ "Medical examiner" means a person appointed pursuant to chapter 406.

(12) ~~(11)~~ "Physician" means a person authorized to practice medicine, osteopathic medicine, or chiropractic medicine pursuant to chapter 458, chapter 459, or chapter 460.

(13) ~~(12)~~ "Registrant" means the child entered on a birth certificate, the deceased entered on a death certificate, and the husband or wife entered on a marriage or dissolution of marriage record.

(14) "Stillbirth" means an unintended, intrauterine fetal death after a gestational age of not less than 20 completed weeks.

(15) ~~(13)~~ "Vital records" or "records" means certificates or reports of birth, death, fetal death, marriage, dissolution of marriage, name change filed pursuant to s. 68.07, and data related thereto.

(16) ~~(14)~~ "Vital statistics" means a system of registration, collection, preservation, amendment, and certification of vital records, the collection of other reports required by this act, and activities related thereto, including

the tabulation, analysis, and publication of data obtained from vital records.

Section 2. Section 382.0085, Florida Statutes, is created to read:

382.0085 Stillbirth registration.--

(1) The person who is required to file a fetal death certificate under this chapter shall advise the parent of a stillborn child:

(a) That the parent may request the preparation of a certificate of birth resulting in stillbirth;

(b) That the parent may obtain a certificate of birth resulting in stillbirth by contacting the Office of Vital Statistics;

(c) How the parent may contact the Office of Vital Statistics to request a certificate of birth resulting in stillbirth; and

(d) That a copy of the original certificate of birth resulting in stillbirth is a document that is available as a public record when held by an agency as defined under s. 119.011(2).

(2) To order a certificate of birth resulting in a stillbirth, a parent may provide a name for a stillborn child, the date of the event, and the county in which the event occurred on the request for a certificate of birth resulting in stillbirth. If a name does not appear on the fetal death certificate and the requesting parent does not wish to provide a name, the Office of Vital Statistics shall fill in the certificate with the name "baby boy" or "baby girl" and the last

name of the parent. The name of the stillborn child provided on or later added by amendment to the certificate of birth resulting in stillbirth must be the same name as placed on the original or amended certificate of the fetal death report pursuant to s. 382.008.

(3) A certificate of birth resulting in stillbirth must include the state file number of the corresponding certificate of fetal death.

(4) The department shall prescribe by rule the form and content of a certificate of birth resulting in stillbirth and shall specify the information necessary to prepare the certificate.

(5) The Office of Vital Statistics may not use a certificate of birth resulting in stillbirth to calculate live birth statistics.

(6) A parent may request that the Office of Vital Statistics issue a certificate of birth resulting in stillbirth regardless of the date on which the certificate of fetal death was issued.

(7) Only a parent named on a fetal death certificate may request that the Office of Vital Statistics issue a certificate of birth resulting in stillbirth. The Office of Vital Statistics must inform any parent who requests a certificate of birth resulting in stillbirth that a copy of the document is available as a public record when held by an agency as defined under s. 119.011(2). A refusal by the Office of Vital Statistics to issue a certificate to a person who is not entitled to a certificate

of birth resulting in stillbirth constitutes final agency action and is not subject to review under chapter 120.

(8) The Office of Vital Statistics may charge a fee for the certificate of birth resulting in stillbirth pursuant to s. 382.0255.

(9) A certificate of birth resulting in stillbirth must contain the statement "This certificate is not proof of a live birth."

(10) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 to administer this section.

Section 3. Paragraph (a) of subsection (1) of section 382.0255, Florida Statutes, is amended to read:

382.0255 Fees.--

(1) The department is entitled to fees, as follows:

(a) Not less than $3 or more than $5 for the first calendar year of records searched or retrieved, including a certificate of birth resulting in stillbirth, and a computer certification of the record, a photocopy or birth card if a computer certification is not available, or, if a ~~no~~ record is not located, a certified statement to that effect. An additional fee of not less than $3 or more than $5 if a photocopy is requested in place of or in addition to a computer certification. Additional fees of not less than $1 or more than $2, up to a maximum total of $50, shall be charged for additional calendar years of records searched or retrieved.

Section 4. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 567 CS Notaries Public
SPONSOR(S): Kyle
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Governmental Operations Committee		Brown	Williamson
3) Transportation & Economic Development Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

A notary public is an appointed public officer, commissioned by the Governor, whose function is to administer oaths, take acknowledgments of deeds and other instruments, attest to or certify photocopies of certain documents, and perform other duties.

This bill requires a notary to maintain a journal of notarial acts. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal.

This bill also authorizes a notary public to charge $10 dollars for each signature notarized, rather than per document. However, the bill prohibits notaries public from charging fees for services to a U.S. military veteran, firefighter, or law enforcement officer applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the regulation of notaries public.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

A notary public (hereinafter "notary" or "notaries") is a "public officer appointed and commissioned by the Governor whose function is to administer oaths; to take acknowledgments of deeds and other instruments; to attest to or certify photocopies of certain documents; and to perform other duties specified by law."[1]

Chapter 117, F.S.,[2] provides for notaries and directs that the Governor is authorized to appoint as many notaries as necessary.[3] A notary must be at least 18 years of age, maintain legal residence in the state throughout the commission, and possess the ability to read, write, and understand English.

Once appointed, a notary serves a four-year term.[4] During the term of office, a notary must post and maintain a $7,500 bond payable to any individual harmed as a result of a notaries breach of duty.[5] The bond must be approved and filed with the Department of State and executed by a surety company that is authorized to transact business in Florida.[6] If a surety pays an individual harmed by the notary for breach of duty, the company must notify the Governor of the payment and the underlying circumstances.[7]

Duties of a Notary

A notary is approved to perform six functions: administer oaths or affirmations;[8] take acknowledgements;[9] attest to photocopies of certain documents;[10] solemnize marriage;[11] verify vehicle identification numbers;[12] and certify contents of a safe-deposit box.[13] With the exception of solemnizing a marriage, a notary public cannot charge more than $10 for each notarial act.[14] Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree,[15] as anyone who impersonates a notary.[16]

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[1] *Governor's Reference Manual for Notaries*, State of Florida, November 2001 ed., pg. 6 (hereinafter "*Reference Manual*").
[2] *See* 1 Fla. Jur 2d Acknowledgments s. 42 stating, "[b]ecause a notary public is generally held to be a public officer, the eligibility of a person to be a notary public is largely regulated by statutory provisions," and citing *Smith v. McEwen*, 161 So. 68 (1935) (notaries public are recognized officers of Florida).
[3] Section 117.01(1), F.S.
[4] *Id.*
[5] Section 117.01(7)(a), F.S.
[6] *Id.*
[7] Section 117.01(8), F.S.
[8] Section 117.03, F.S.
[9] Section 117.04, F.S.
[10] Section 117.05(12)(a), F.S.
[11] Section 117.045, F.S.
[12] Section 319.23(3)(a)2., F.S.
[13] Section 655.94(1), F.S.
[14] Sections 117.05(2)(a) and 117.045, F.S.
[15] Section 117.05(3)(e), F.S.
[16] Section 117.05(7), F.S.

Suspension of a Notary

The Governor can suspend a notary for any of the grounds provided in Art. 4, s. 7, Fla. Const.[17] The Governor also may suspend a notary for grounds of malfeasance, misfeasance, or neglect of duty, as specified in s. 117.01(4), F.S.[18]

Effect of Bill

The bill requires a notary to maintain a journal of notarial acts.[19] The journal is to contain each notarial act in sequential order. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer.[20] Moreover, the notarial journal must be maintained by a notary for at least 5 years after the date of the last entry. Should a journal be stolen, lost, misplaced, destroyed, or rendered unusable, the notary is required to immediately notify the Executive Office of the Governor in writing of the circumstances of the incident. Finally, failure by a notary to comply with these requirements could result in the suspension or non-renewal of the notary's public commission by the Executive Office of the Governor.

A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

Current law allows a notary to charge up to $10 per notarial act.[21] This bill permits a notary to charge $10 per signature notarized, rather than $10 per notarial act. However, a notary may not charge fees for services to a U.S. military veteran, firefighter, or law enforcement officer who is applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

C. SECTION DIRECTORY:

Section 1 amends s. 117.05, F.S., regarding notary fees.

Section 2 creates s. 117.071, F.S., requiring a notary to maintain a journal of each notarial act.

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[17] The grounds for suspension by the Governor found in Art. 4, s. 7, Fla. Const. are: "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony...."

[18] Grounds of malfeasance, misfeasance, or neglect of duty, specified in section 117.01(4), F.S., include, but are not limited to: a material false statement on the application; a complaint found to have merit by the Governor; failure to cooperate or respond to an investigation by the Governor's Office or the Department of State regarding a complaint; Official misconduct as defined in s. 838.022, F.S.; false or misleading advertising relating to notary public services; unauthorized practice of law; failure to report a change in address or telephone number within the required time or failure to request an amended commission following a name change; commission of fraud, misrepresentation, or any intentional violation of ch. 117, F.S.; charging fees in excess of fees authorized by law; or failure to maintain the required bond.

[19] In 1998, the Legislature enacted a law that required all electronic notarizations to be logged in a journal. *See*, ch. 98-246, L.O.F.; s. 117.20, F.S., (1998 Supp.). Each notarial act memorialized in the journal had to include certain information and be kept at least five years. If the journal was lost or stolen, the notary had to notify the Governor's Office or the Department of State. The notary public had to let the Governor's Office or the Department of State inspect the journal at any time it requested. In 1999, the law was repealed. *See*, s. 165, ch. 99-251, L.O.F. Although Florida law does not currently require the use of a notary journal, the *Governor's Reference Manual for Notaries* recommends that notaries voluntarily maintain a journal. *Reference Manual*, at 42.

[20] The National Notary Association ("NNA") compiled the Model Notary Act of 2002, which was an attempt to modernize the notary public office. The Act was the work of a drafting committee of individuals from the legal, business and governmental spheres. *See* http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf (last visited March 2, 2006). The Model Notary Act, in ss. 7-1 and 7-2, requires a notary to maintain a journal and suggests that the journal contain a list of information for each act performed; which would include the thumbprint of each principal and witness in a notarial act. The thumbprint requirement, along with several other requirements, was considered controversial by the committee. Comment, s. 7-2(a), Model Notary Act. The instant bill contains no such provision.

[21] Section 117.05(2)(b)2., F.S.

Section 3 provides an effective date of January 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A notary public must purchase a journal for recording notarial acts.[22]

D. FISCAL COMMENTS:

Due to the new requirements of this bill, the amount of time necessary for a notary public to notarize a document may be increased, thereby potentially increasing the cost of businesses that rely on notary services.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Public Records Law

Under s. 119.07(1)(a), F.S.:

[22] Journals of notarial acts can be purchased for between $11.95, with space for over 700 entries, to $34.99, which provides space for 775 notarizations.

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

As used in s. 119.07, F.S., the term "public records" means:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[23]

As used in s. 119.07, F.S., the term "agency" means:

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.[24]

Because a notary public is a public officer under the State Constitution, the notary journal required by this bill may be a public record that is available for inspection and copying pursuant to Art. I, s. 24(a), Fla. Const. and ch. 119, F.S.

Journal Requirement

The *Reference Manual* drafted by the Governor's Task Force on Notaries Public in 1989 suggested the mandatory use of journals.[25] Moreover, while notary journals are not required to maintain a journal under current law, the *Reference Manual* recommends "any notary who is concerned with liability may want to consider this protective measure to provide a permanent record of his or her notarial acts."[26] Furthermore, the National Notary Association maintains that the use of a notarial journal will assist in preventing real estate fraud. It appears that the NNA's chief tool in preventing real estate fraud is the requirement that each document signer place a thumbprint in the notarial journal; a requirement absent from this bill.

Detractors of the bill point to the increased responsibility a notary would have for each signature as being unduly cumbersome. Their concern revolves around the additional time needed for a notary need to comply with the new requirements.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- An exception to the journal requirement was created. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

- In the event a notary's journal is stolen, lost, misplaced, destroyed, or rendered unusable, the amendment requires the notary to notify solely the Executive Office of the Governor.

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[23] Section 119.011(11), F.S.
[24] Section 119.011(2), F.S.
[25] *Reference Manual*, at 42.
[26] *Id.*, at 43.

- The title was corrected.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to notaries public; amending s. 117.05, F.S.; authorizing notaries public to charge a fee per notarized signature; requiring notaries public to provide services without charge to certain persons; creating s. 117.071, F.S.; requiring notaries public to maintain a journal and to record notarial acts; providing an exception; providing requirements for journal entries; requiring retention of the journal for a specified period after the last entry and requiring certain notice upon failure to do so; providing that failure to comply with such requirements may constitute grounds for suspension or nonrenewal of the notary public commission by the Executive Office of the Governor; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 117.05, Florida Statutes, is amended to read:

117.05 Use of notary commission; unlawful use; notary fee; seal; duties; employer liability; name change; advertising; photocopies; penalties.--

(2)(a) The fee of a notary public may not exceed $10 per signature notarized for any one notarial act, except as provided in s. 117.045.

(b) A notary public may not charge a fee:

1. For witnessing an absentee ballot in an election, and must witness such a ballot upon the request of an elector, provided the notarial act is in accordance with the provisions of this chapter.

2. For any notarial act performed for a United States military veteran or a firefighter or law enforcement officer applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

Section 2. Section 117.071, Florida Statutes, is created to read:

117.071 Use of journal for notarial acts.--

(1) Each notarial act shall be recorded by the notary public sequentially in a journal in accordance with the provisions of this chapter. A notary who is either an attorney at law licensed to practice in this state or who is employed by an attorney at law licensed to practice in this state is exempt from the requirement to keep a journal of notarial acts.

(a) For each notarial act, the notary public shall record in the journal at the time of notarization:

1. The date and time of the notarial act.

2. The type of notarial act.

3. The title or name of the document or transaction.

4. The signer's printed name and signature.

5. The signer's complete address, telephone number, and specific type of identification presented by the signer.

(b) The notary public must retain the journal for safekeeping for at least 5 years after the date of the last entry.

(c) If the notary public journal is stolen, lost, misplaced, destroyed, or rendered unusable within the time period specified in paragraph (b), the notary public must immediately notify the Executive Office of the Governor in writing of the circumstances of the incident.

(2) Failure of a notary public to comply with the requirements of this section may constitute grounds for suspension or nonrenewal of the notary public commission by the Executive Office of the Governor.

Section 3. This act shall take effect January 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 581 Public Benefits
SPONSOR(S): Cretul and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1796

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee		Brown	Williamson
2) Fiscal Council			
3) State Administration Council			
4)			
5)			

SUMMARY ANALYSIS

The bill prohibits the use of state funds, under the state employee benefit program, for any program providing benefits for any individuals other than enrollees and the spouses and dependent children of enrollees. The bill repeats the prohibition as it applies to the community college board of trustees and the state university board of trustees.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – The bill creates a prohibition on certain state insurance premium contributions from state employers.

B. EFFECT OF PROPOSED CHANGES:

Background: State Employee Health Care

Chapter 110, F.S., provides the statutory authority for the implementation of health insurance and prescription drug coverage for all enrollees. Enrollees include all state officers and employees, retired state officers and employees, surviving spouses of deceased state officers and employees, as well as all state university officers and employees, retired state university officers and employees, and surviving spouses of deceased state university officers and employees.[1]

Enrollees may choose between a self-insured indemnity plan called a preferred provider organization (PPO) or an approved health management organization (HMO). Sections 110.123 and 110.12315, F.S., describe the coverage available and specify the minimum complement of benefits each approved provider must offer. An enrollee may select health insurance coverage from a number of approved provider organizations. The state-sponsored preferred provider organization provides universal access in all of Florida's 67 counties. As an alternative, the enrollee may choose to enroll in one of several managed care plans offered by participating HMOs pre-approved by the Division of State Group Insurance in the Department of Management Services. In counties not served by an HMO, this option is unavailable to enrollees.

The Department of Management Services has authority to establish a comprehensive package of insurance benefits that may include supplemental insurance products. Supplemental insurance is designed to provide coverage for certain treatments that are not included in a health insurance policy, or to provide additional benefits to those already offered in a health insurance policy. The State currently offers active employees the opportunity to purchase from private insurers various supplemental insurance plans and to have the premium payments for such plans deducted from the employee's pay on a pre-tax basis. Unlike the State sponsored PPO or HMO plans, the State does not contribute to any portion of the premium for supplemental insurance. Some of the various supplemental insurance products available to enrollees include vision insurance, dental insurance, supplemental hospitalization insurance, cancer and cancer/intensive care insurance, and accident and accident disability insurance.

Effect of Proposed Legislation

The bill addresses the state's participation in funding benefits programs under the state's insurance programs. The bill prohibits the use of state funds when a benefit is provided "for any individuals other than enrollees and the spouses and dependent children of enrollees." According to the Division of State Group Insurance, the bill "has no impact on Department of Management Services or the State Group Insurance Program as currently administered by the Division of State Group Insurance in accordance with *Florida Statutes* and *Florida Administrative Code*."[2]

If a benefits program were offered by a private provider and that program offered benefits to anyone other than the enrollee or the enrollee's spouse and children, the enrollee would be required to cover

[1] Sec. 110.123(2)(b), F.S.

[2] Department of Management Services, 2006 Substantive Bill Analysis HB 581, February 7, 2006.

the entire contribution. The state would not be permitted to contribute to the premium as a benefit to the employee. There are currently no such programs.[3]

C. SECTION DIRECTORY:

Section 1 amends s. 110.123, F.S., to prohibit the use of state funds to provide a benefit for anyone other than an enrollee or the spouse or dependent of an enrollee.

Section 2 amends s. 1001.64, F.S., to repeat the prohibition as applied to the community college board of trustees.

Section 3 amends s. 1001.74, F.S., to repeat the prohibition as applied to the state university board of trustees.

Section 4 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a state expenditure. The bill reduces potential expenditures related to employee benefits; however the Division of State Group Insurance has advised that there are currently no programs that would be affected by this legislation.[4]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill reduces potential expenditures related to employee benefits. It is unknown whether or not any local governments currently maintain benefits programs that would be impacted by this legislation.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

[3] *Id.*
[4] *Id.*

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

A bill to be entitled

An act relating to public benefits; amending s. 110.123, F.S., relating to the state group insurance program; prohibiting funding for benefits granted under the program from being used to provide benefits for any individuals other than enrollees and the spouses and dependent children of enrollees; amending s. 1001.64, F.S.; prohibiting community college boards of trustees from establishing benefits programs that use state funding to provide benefits for any individuals other than enrollees and the spouses and dependent children of enrollees; amending s. 1001.74, F.S.; prohibiting university boards of trustees from establishing benefits programs that use state funding to provide benefits for any individuals other than enrollees and the spouses and dependent children of enrollees; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (13) is added to section 110.123, Florida Statutes, to read:

110.123 State group insurance program.--

(13) CERTAIN BENEFITS PROHIBITED.--No state funding for benefits granted under this section shall be used to provide benefits for any individuals other than enrollees and the spouses and dependent children of enrollees.

Section 2. Subsection (18) of section 1001.64, Florida Statutes, is amended to read:

1001.64 Community college boards of trustees; powers and duties.--

(18) Each board of trustees shall establish the personnel program for all employees of the community college, including the president, pursuant to the provisions of chapter 1012 and rules and guidelines of the State Board of Education, including: compensation and other conditions of employment; recruitment and selection; nonreappointment; standards for performance and conduct; evaluation; benefits and hours of work; leave policies; recognition; inventions and work products; travel; learning opportunities; exchange programs; academic freedom and responsibility; promotion; assignment; demotion; transfer; ethical obligations and conflict of interest; restrictive covenants; disciplinary actions; complaints; appeals and grievance procedures; and separation and termination from employment. The boards of trustees are prohibited from establishing benefits programs that use state funding to provide benefits for any individuals other than enrollees and the spouses and dependent children of enrollees.

Section 3. Subsection (19) of section 1001.74, Florida Statutes, is amended to read:

1001.74 Powers and duties of university boards of trustees.--

(19) Each board of trustees shall establish the personnel program for all employees of the university, including the president, pursuant to the provisions of chapter 1012 and, in accordance with rules and guidelines of the State Board of Education, including: compensation and other conditions of

employment, recruitment and selection, nonreappointment, standards for performance and conduct, evaluation, benefits and hours of work, leave policies, recognition and awards, inventions and works, travel, learning opportunities, exchange programs, academic freedom and responsibility, promotion, assignment, demotion, transfer, tenure and permanent status, ethical obligations and conflicts of interest, restrictive covenants, disciplinary actions, complaints, appeals and grievance procedures, and separation and termination from employment. The boards of trustees are prohibited from establishing benefits programs that use state funding to provide benefits for any individuals other than enrollees and the spouses and dependent children of enrollees. The Department of Management Services shall retain authority over state university employees for programs established in ss. 110.123, 110.161, 110.1232, 110.1234, and 110.1238 and in chapters 121, 122, and 238.

Section 4. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GO 06-15 OGSR Autopsy Photographs and Audio and Video Recordings
SPONSOR(S): Governmental Operations Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 592, SB 1052

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee		Williamson	Williamson
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The bill reenacts the public records exemption for photographs and video and audio recordings of an autopsy in the custody of a medical examiner. The bill reorganizes the section and makes editorial changes. The exemption will repeal on October 2, 2006, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

District Medical Examiners

The Governor appoints a district medical examiner for each medical examiner district from nominees who are practicing physicians in pathology. The Medical Examiners Commission[1] submits the nominations to the Governor.[2]

Each district medical examiner may appoint as many physicians as necessary to serve as associate medical examiners. The associate medical examiner serves at the pleasure of the district medical examiner and, when necessary, provides "service at all times and all places within the district."[3]

The district medical examiner has the authority to perform or have performed whatever autopsies[4] or laboratory examinations he or she deems necessary and in the public interest.[5] In the absence of the medical examiner or the associate medical examiner, the state attorney of the county may appoint a competent physician to act in his or her stead.[6]

District Medical Examiner Records

The district medical examiner must maintain duplicate copies of records and the detailed findings of autopsy and laboratory investigations.[7]

Public Records Exemption

A photograph or video or audio recording of an autopsy in the custody of a medical examiner[8] is confidential and exempt[9] from public records requirements.[10] A surviving spouse may view and copy a

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[1] The Medical Examiners Commission is created within the Department of Law Enforcement (s. 406.02(1), F.S.) The commission establishes medical examiner districts within the state (s. 406.05, F.S.)

[2] Section 406.06(1)(a), F.S.

[3] Section 406.06(2), F.S.

[4] A medical examiner is required to perform an autopsy when any person dies of criminal violence; by accident; by suicide; suddenly, when in apparent good health; unattended by a practicing physician or other recognized practitioner; in any prison or penal institution; in police custody; in any suspicious or unusual circumstance; by criminal abortion; by poison; by disease constituting a threat to public health; or by disease, injury, or toxic agent resulting from employment. Section 406.11(11)(a), F.S.

[5] Section 406.11(2)(a), F.S.

[6] Section 406.15, F.S.

[7] Section 406.13, F.S.

[8] For purposes of the exemption, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to chapter 406, F.S. The term also includes any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties. Section 406.135(1), F.S.

[9] There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. *See* Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

[10] Section 406.135(1), F.S.

photograph or video recording or listen to or copy the audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain confidential and exempt autopsy records may designate in writing an agent to obtain those records.[11]

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt.[12]

The custodian of such records may not permit any other person to view or copy an autopsy photograph or video recording or to listen to or copy the audio recording without a court order.[13] A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.[14] Upon a showing of good cause,[15] the court may issue an order authorizing a person to view or copy a photograph or video recording of an autopsy or to listen to or copy the audio recording.[16]

This public records exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, it appears to apply to such information submitted as part of a civil proceeding.[17] In *Sarasota Herald-Tribune v. State*,[18] the Second District Court of Appeal found that the public records exemption for autopsy photographs and video and audio recordings does not apply to a criminal proceeding because the statute specifically exempts criminal court proceedings from its application.

It is a third degree felony for any:

- Custodian of such photograph or video or audio recording who willfully and knowingly violates the provisions of the exemption.[19]
- Person who willfully and knowingly violates a court order issued pursuant to s. 406.135, F.S.[20]

Pursuant to the Open Government Sunset Review Act,[21] the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It also reorganizes the section and makes editorial changes.

C. SECTION DIRECTORY:

Section 1 amends s. 406.135, F.S., to remove the October 2, 2006, repeal date.

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Section 406.135(2)(b), F.S.
[15] In determining good cause, the court must consider whether disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records. In all cases, the viewing, copying, or listening must be under the direct supervision of the records custodian. Section 406.135(2)(a), F.S.
[16] Section 406.135(2)(a), F.S.
[17] Section 406.135(3)(c), F.S.
[18] 2005 WL 3112545 (Fla. App. 2 Dist.)
[19] Section 406.135(3)(a), F.S.
[20] Section 406.135(3)(b), F.S.
[21] Section 119.15, F.S.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   This bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill may represent a minimal non-recurring positive impact on local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

   Overly Broad

   Article I, s. 24(c) of the State Constitution, requires that an exemption be no broader than necessary to accomplish its stated purpose.

In *Campus Communications, Inc., v. Earnhardt*,[22] the Fifth District Court of Appeal upheld the public records exemption for autopsy photographs and video and audio recordings against an unconstitutional over breadth challenge. The court found that the exemption met the constitutional requirement that the exemption be no broader than necessary to meet its public purpose. The court also found that the legislature stated with specificity the public necessity justifying the exemption.

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. In July 2003, the Florida Supreme Court denied review of the case, leaving in place the appellate court ruling.[23]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments

The current public records exemption does not apply to autopsy photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, a civil proceeding is not included in the exception. In order to create uniformity, the inclusion of civil proceedings in the list of exceptions is recommended.

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

[22] 821 So.2d 388 (Fla. 5th DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003).
[23] 848 So.2d 1153 (Fla. 2003).

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act regarding autopsy photographs and video and audio recordings; amending s. 406.135, F.S., which provides an exemption from public records requirements for autopsy photographs and video and audio recordings in the custody of a medical examiner; reorganizing the section; making editorial changes; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 406.135, Florida Statutes, is amended to read:

406.135 Autopsies; confidentiality of photographs and video and audio recordings; exemption.--

(1) For the purpose of this section, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to this chapter, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

(2) A photograph or video or audio recording of an autopsy held by ~~in the custody of~~ a medical examiner is confidential and exempt from ~~the requirements of~~ s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse may view and copy a photograph or video recording or listen to or

copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records.

(3)(a) ~~However,~~ The deceased's surviving relative, with whom authority rests to obtain such records, may designate in writing an agent to obtain such records.

(b) A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt.

(c) The custodian of the record, or his or her designee, may not permit any other person, except an agent designated in writing by the deceased's surviving relative with whom authority rests to obtain such records, to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. ~~For the purposes of this section, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to this chapter, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.~~

(4)~~(2)~~(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or

copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate.

(b) In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.

(c) In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(5) ~~(b)~~ A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the parents of the deceased ~~deceased's parents~~, and if the deceased has no living parent, then to the adult children of the deceased.

(6) ~~(3)~~ (a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(7) ~~(c)~~ A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of chapter 119, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(8) ~~(4)~~ This exemption shall be given retroactive application.

~~(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2006.

Governmental Operations Committee

Wednesday, March 8, 2006
1:00 – 3:00 PM
Morris Hall

Amendment Packet

Allan Bense
Speaker

David Rivera
Chairman

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES
Amendment No. 1

Bill No. **HB 325 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Governmental Operations
Representative(s) Gelber offered the following:

Amendment (with title amendments)

Remove lines 180-200:

(4)(a) Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. If the appointed attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the Commission on Capital Cases shall notify the trial court, which may impose a fine or remove the attorney from the case. If the appointed attorney fails to execute the contract within 45 days after the date the contract is mailed to the attorney, the executive director shall remove the attorney from the registry list. The Chief Financial Officer shall develop the form of the contract, function as contract manager, and enforce performance of the terms and conditions of the contract. By signing such contract, the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.

In no event shall an attorney receive any funds from the state treasury without executing the contract required by this paragraph.

(b) Each private attorney appointed by a court to represent a capital defendant shall submit a report each quarter to the commission in the format designated by the commission. If the attorney does not submit the report within 30 days after the end of the quarter, the executive director shall notify the court, which may impose a fine or remove the attorney from the case. If the attorney fails to submit the report within 45 days after the end of the quarter, the executive director shall remove the attorney from the registry list.

(c) Any appointed attorney removed from the registry may, at the discretion of the court, continue to represent any clients the attorney has been appointed to represent as of the date of removal. If the court allows an attorney who has been removed from the registry to continue to represent previously appointed capital defendants, the court shall take all necessary actions to ensure compliance with the requirements of this subsection. An attorney who has been removed from the registry is prohibited from accepting appointment to represent any new capital defendants unless the attorney is placed back on the registry as provided in paragraph (d).

(d) After certifying to the executive director that they will act in accordance with the provisions of this subsection, attorneys removed from the registry may, after 60 days, reapply for the registry as provided in subsection (2). An attorney may reapply for the registry no more than two times under the provisions of this paragraph for failure to adhere to the requirements of this subsection.

54 ========== T I T L E A M E N D M E N T ==========
55 Remove lines 24-26 of title and insert:
56 Commission; requiring the executive director to notify the trial
57 court and remove an attorney from the registry if the attorney
58 does not submit the report within a specified time; authorizing
59 the Commission on Capital Cases to return a removed attorney to
60 the registry; requiring that

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. **HB 439 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Governmental Operations

Representative(s) Planas offered the following:

Amendment (with title amendments)

Remove lines 108-185 and insert:

Section 2. Section 382.008, Florida Statutes, is amended to read:

382.008 Death and fetal death registration.--

(2)(a) The funeral director who first assumes custody of a dead body or fetus shall file the certificate of death or fetal death. In the absence of the funeral director, the physician or other person in attendance at or after the death shall file the certificate of death or fetal death. The person who files the certificate shall obtain personal data from the next of kin or the best qualified person or source available. The medical certification of cause of death shall be furnished to the funeral director, either in person or via certified mail, by the physician or medical examiner responsible for furnishing such information. For fetal deaths, the physician, midwife, or hospital administrator shall provide any medical or health information to the funeral director within 72 hours after expulsion or extraction.

(b) The local registrar may receive electronically a certificate of death or fetal death which is required to be filed with the registrar under this chapter through facsimile or other electronic transfer for the purpose of filing the certificate. The receipt of a certificate of death or fetal death by electronic transfer constitutes delivery to the local registrar as required by law.

Section 2. Section 382.0085, Florida Statutes, is created to read:

Stillbirth registration.--

(1) For any stillborn child in this state, the department shall, within 60 days, issue a certificate of birth resulting in stillbirth upon the request of a parent named on a fetal death certificate.

(2) The person who is required to file a fetal death certificate under this chapter shall advise the parent of a stillborn child:

(a) That the parent may request the preparation of a certificate of birth resulting in stillbirth in addition to the fetal death certificate;

(b) That the parent may obtain a certificate of birth resulting in stillbirth by contacting the Office of Vital Statistics;

(c) How the parent may contact the Office of Vital Statistics to request a certificate of birth resulting in stillbirth; and

(d) That a copy of the original certificate of birth resulting in stillbirth is a document that is available as a public record when held by an agency as defined under s. 119.011(2).

(3) The request for a certificate of birth resulting in stillbirth shall be on a form prescribed by the department by rule and must include the date of the stillbirth and the county in which the stillbirth occurred. The request shall normally include the state file number of the fetal death report pursuant to s. 382.008.

(4) The certificate of birth resulting in stillbirth shall contain:

(a) The date of the stillbirth.

(b) The county in which the stillbirth occurred.

(c) The name of the stillborn child as provided on the original or amended certificate of the fetal death report pursuant to s. 382.008. If a name does not appear on the original or amended fetal death certificate and the requesting parent does not wish to provide a name, the Office of Vital Statistics shall fill in the certificate of birth resulting in stillbirth with the name "baby boy" or "baby girl" and the last name of the parents as provided in s. 382.013(3).

(d) The state file number of the corresponding certificate of fetal death.

(e) The following statement: "This certificate is not proof of live birth."

(5) A certificate of birth resulting in stillbirth shall be a public record when held by an agency as defined under s. 119.011(2). The Office of Vital Statistics must inform any parent who requests a certificate of birth resulting in stillbirth that a copy of the document is available as a public record.

(6) A parent may request that the Office of Vital Statistics issue a certificate of birth resulting in stillbirth

regardless of the date on which the certificate of fetal death was issued.

(7) It is final agency action, not subject to review under chapter 120, for the Office of Vital Statistics to refuse to issue a certificate to a person who is not a parent named on the fetal death certificate and who is not entitled to a certificate of birth resulting in stillbirth.

(8) The Office of Vital Statistics may not use a certificate of birth resulting in stillbirth to calculate live birth statistics.

(9) The department shall prescribe by rules adopted pursuant to ss. 120.536(1) and 120.54, the form, content, and process for the certificate of birth resulting in stillbirth.

Section 3. Paragraph (h) is added to subsection (1) of section 382.013, Florida Statutes, to read:

382.013 Birth registration.--A certificate for each live birth that occurs in this state shall be filed within 5 days after such birth with the local registrar of the district in which the birth occurred and shall be registered by the local registrar if the certificate has been completed and filed in accordance with this chapter and adopted rules. The information regarding registered births shall be used for comparison with information in the state case registry, as defined in chapter 61.

(1) FILING.--

(h) The local registrar may receive electronically a birth certificate for each live birth which is required to be filed with the registrar under this chapter through facsimile or other electronic transfer for the purpose of filing the birth certificate. The receipt of a birth certificate by electronic

transfer constitutes delivery to the local registrar as required by law.

Section 4. Paragraph (j) is added to subsection (1) of section 382.0255, Florida Statutes, to read:

382.0255 Fees.--

(1) The department is entitled to fees, as follows:

(j) Not less than $3 or more than $5 for processing and filing a new certificate of birth resulting in stillbirth pursuant to s. 382.0085.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to certificates of birth and death; amending s. 382.002, F.S.; providing definitions; amending s. 382.008, F.S.; authorizing the local registrar of the Office of Vital Statistics of the Department of Health to receive electronically the certificate of death or fetal death which is required to be filed with the local registrar; creating s. 382.0085, F.S.; requiring the Department of Health to issue a certificate of birth resulting in stillbirth upon request of specified parent; requiring that the person required to file the fetal death certificate advise a parent of a stillborn child about the availability of a certificate of birth resulting in stillbirth; requiring that the person required to file the fetal death certificate inform a parent of a stillborn child that copies of the birth certificate resulting in stillbirth may be available as a public record; requiring a form prescribed by the Department of Health and specified information to request a certificate of birth resulting in stillbirth; providing requirements for the certificate of birth

resulting in stillbirth; designating the certificate of birth resulting in stillbirth as a public record; authorizing a parent to request a certificate of birth resulting in stillbirth without regard to the date on which the certificate of fetal death was issued; designating the refusal to issue a certificate of birth resulting in stillbirth to certain persons as final agency action not subject to administrative review; prohibiting the use of certificates of birth resulting in stillbirth to calculate live birth statistics; entitling the Office of Vital Statistics to a fee for the certificate of birth resulting in stillbirth; authorizing rulemaking by the Department of Health for the certificate of birth resulting in stillbirth; amending s. 382.013, F.S.; authorizing the local registrar of the Office of Vital Statistics of the Department of Health to receive electronically the birth certificate for each live birth that is required to be filed with the local registrar; amending s. 382.0255, F.S.; authorizing the Department of Health to collect fees for a certificate of birth resulting in stillbirth; providing an effective date.